ITO Corporation of Rhode Island, Inc. *and* James W. Wesley, Jr.

International Longshoremen's Association Local 1329 *and* James W. Wesley, Jr. Cases 1-CA-14748, 1-CB-4095, 1-CB-4157, and 1-CB-4691

March 21, 1983

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 30, 1982, Administrative Law Judge Burton S. Kolko issued the attached Supplemental Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent International Longshoremen's Association Local 1329, its officers, agents, and representatives, shall pay James Wesley, Jr., the sums set out in the said recommended Order, and that Respondent ITO Corporation of Rhode Island, Inc., its officers, agents, successors, and assigns, shall be secondarily liable in the manner set forth in said recommended Order.

[1] In the absence of exceptions, we adopt the finding that Respondent Union's backpay liability for Wesley's demotion from the walking foreman position is tolled as of the day following its mailing of a letter to ITO Corporation, unequivocally stating that it had no objection to ITO's reinstatement of Wesley to this position. Compare *C. B. Display Service, Inc.*, 260 NLRB 1102 (1982). In addition, we note that the instant backpay specification, as amended at the hearing, covers Respondents' backpay obligations only through the end of 1981 for the failure and refusal to refer Wesley to the relief winchman position or its equivalent. The backpay specification does not address, nor do we resolve, any continuing backpay liability for subsequent periods.

SUPPLEMENTAL DECISION

BURTON S. KOLKO, Administrative Law Judge: These consolidated cases[1] form the basis for a backpay proceeding[2] that arose out of a Board Order in 246 NLRB 810 (1979). The Board found that the Union violated Section 8(b)(1)(B) and (A) of the Act when it forced ITO, in March 1978, to remove James Wesley, Jr., from his supervisory position of walking foreman. To remedy this violation, the Board ordered the Union to notify ITO that it had no objection to Wesley's reemployment as walking foreman and to make Wesley whole for all moneys lost as the result of his removal from that position.

The Board also found that the Union had violated Section 8(b)(1)(A) and (2) by causing ITO not to employ Wesley as a relief winchman, and that ITO had violated Section 8(a)(3) and (1) by acquiescing in the Union's demand that he not be so employed. To remedy the violation involving the relief winchman's position, the Board ordered the Union to notify ITO that it had no objection to Wesley's employment as an employee and to refer Wesley to the first relief winchman's position that he requested. The Board further ordered the Union and ITO to make Wesley whole for all lost earnings suffered by him in connection with the relief winchman's position. The Union and ITO were found jointly and severally liable for the backpay for this position, with the Union primarily liable. The Board's Order pertaining to the Union was enforced by the United States Court of Appeals for the First Circuit on September 22, 1980. On October 2, 1980, that same court enforced the Board's Order pertaining to the Employer (ITO). Both are unreported.

This matter, solely involving backpay, was heard before me in Boston, Massachusetts, on January 26 and 27, 1982.[3] Based upon that record and counsels' briefs, I find that James Wesley is due the amount of backpay for the walking foreman position and $110 for medical expenses plus accrued interest as computed by Region 1: $28,803.82.[4] This amount will be paid by the Union, which is primarily liable.

Walking Foreman Retainers and Day-Before/Day-After Payments

The issues *sub judice* concern payments that are particular to longshoremen jobs—retainer payments, which a company pays to the walking foreman, usually every

[1] Case 1-CB-4691 was consolidated when this hearinq began since it involves issues identical to the other two CB cases.

[2] The Vierra case, Case 1-CB-4491, was separated from the Wesley cases at hearing, since a tentative settlement had been worked out between Vierra and the Union. Correspondence with the counsel for the General Counsel indicates that settlement has been reached between the parties. Therefore, I grant the General Counsel's request for leave to withdraw the backpay specification in Case 1-CB-4491.

[3] Counsel for the General Counsel has submitted a motion to correct transcript. The motion is granted.

[4] The figure awarded, taken from counsel for the General Counsel's brief, differs from the backpay specification at hearing because some figures for 1981-2d quarter were estimated. The difference is approximately $168.38.

Counsel for the Union suggested a figure of $22,742.77. There being no explanation of how such a figure was arrived at, this amount is rejected.

week, even if there are no ships to be unloaded that week; day-before/day-after payments, which are 8 hours' worth of pay for the day before a ship comes in to be unloaded and 8 hours for the day after the ship has been unloaded, and 8 hours of pay for the day the ship is in dock, which are charged to the Company for the walking foreman regardless of whether the actual hours worked were less than 8.

Wesley testified credibly that he was replaced as walking foreman by Frank Freitas in March 1978, and that Freitas remained as number one walking foreman until August 1981. The Union contends that retainer payments to Freitas are not appropriately part of Wesley's losses since there is no provision for retainer payments in the applicable contracts. Testimony at the hearing confirmed that no retainers are provided for in the contracts. Yet it also became clear that there was a private arrangement made between ITO and the walking foreman. Wesley testified that he was receiving retainer payments at the time of his removal from the walking foreman position. Compliance Officer Beal from the Board's Region 1 office further testified that payroll records reveal that from March 1978 to September 1979 Freitas was paid retainers by ITO.[5] (The practice was discontinued in September 1979.)

Thus, Wesley is entitled to retainers for as long as Freitas was paid them. The fact that retainer payments were not included in the collective-bargaining agreement does not render them inappropriate for inclusion as a part of Wesley's damages. The Board's "make whole" concept is an attempt to restore the *status quo ante* and does not turn on whether the payment was obligatory or gratuitous.[6]

The make-whole rationale also provides the basis for inclusion of the day-before and day-after pay in Wesley's backpay amount. Wesley testified that day-before and day-after pay was paid pursuant to a similar private arrangement between ITO and the walking foreman, and that when he returned as temporary walking foreman in August 1981 these payments worked the same as they had in March 1978. Beal's testimony confirms that Freitas received day-before and day-after pay throughout his tenure as walking foreman. Thus, Wesley is due both.

Vacation and Holiday Pay

The amount of vacation pay received by longshoremen is determined by the number of hours worked in a fiscal year. Holiday pay is determined in the same manner, in part. In addition to the hourly requirement, to qualify for holiday pay one must work at least 16 hours during the week in which the holiday falls.

As a walking foreman Wesley had an excellent attendance record. Manager Stanton described it as "100%." Had he remained as number one walking foreman, it is reasonable to conclude that Wesley would have continued his practice of working every ITO ship during the backpay period. Because Wesley was not able to retain the position (and its benefit of 8 hours day-before and day-after a ship came in and a guaranteed 8 full hours on the day of unloading), his vacation and holiday pay was lower than it might have been. Thus, I am allowing the difference between Freitas' and Wesley's vacation and holiday pay during the backpay period to be awarded to Wesley.[7]

Tolling of the Backpay Period for Walking Foreman

A major issue in this case deals with when the backpay period was tolled.

On October 16, 1980, counsel for the Union sent a letter to ITO in an effort to toll backpay for Wesley. Compliance Officer Beal contacted the Union's counsel after receipt of the letter and indicated that the letter did not meet the specification called for in the Board's Order from the earlier decision. According to Beal, Union's counsel agreed and said that he would send a clarifying letter.

In the meantime, a conversation took place between Union President Silva and ITO Manager Stanton. On October 23, 1980, Stanton told Silva that ITO intended to comply with the court decree. He asked Silva for his assurance that there would be no more "trouble" if Wesley were reinstated as walking foreman. (There had been walkoffs previously over the appointment of Wesley as walking foreman.) Silva responded that he could not guarantee that there would be no more strikes or walkoff because at a union meeting that had been held recently, when Silva told the men that they would have to go back to work for Wesley, 30 or 40 men got up and said that they would not go back to work for him. (But see fn. 11, *infra*.)

Later that same day, Stanton met with Wesley and related to Wesley what Silva had said. According to Wesley, Stanton told him that ITO was willing to reinstate Wesley but could not run the risk of another walkoff by the longshoremen. Thus, Wesley was not reinstated at that time.

On October 27, 1980, the Union's counsel sent a clarifying letter to ITO. No mention was made of Silva's remarks to Stanton.

Silva remained as president of the Union until May 1981. On May 12, 1981, when Barry O'Connor was president, the Union sent a letter to ITO. Based upon

[5] The fourth quarter for 1979, the last quarter in which retainer payments were made, shows a payment of $80.80. (G.C. Exh. 1-1, p. 9.) No testimony was given by either side as to why this amount was less than the usual $125 payment; nevertheless I have included the amount in the backpay due to Wesley.

[6] See for instance, *W. C. Nabors, d/b/a W. C. Nabors Company* v. *N.L.R.B*, 323 F.2d 686, 690 (5th Cir. 1963), where the court stated:

> The Board's discretion to take such affirmative *remedial* action as will effectuate the purposes of the Act includes more than placing the employee in a position to assert contractual or legally enforceable obligations. "Back pay" as used in Section 10(c) includes the moneys, whether gratuitous or not, which it is reasonably found that the employee would actually have received in the absence of the unlawful discrimination.

[7] Counsel for the Union has suggested that $338.85 be deducted from the backpay specification because Wesley was away on Christmas vacation. However, Wesley credibly testified that as a walking foreman he would have had advance notice that a ship would be in at that time. Following his usual pattern, he would have changed his vacation to a time when he would not have had to miss a ship.

this letter, Compliance Offier Beal tolled the backpay for the walking foreman's position on May 13, 1981.

In cases where a union is required to inform an employer that it has no objection to the reinstatement of an individual, the Board requires that the union take clear, unequivocal action.[8] Given the fact that Stanton went to Silva to be reassured about the authenticity of the promises made in the letter sent by the Union's counsel, and was assured of nothing by Silva, it is clear that ITO would view the October 16 and 27 letters with some skepticism. The October 27 letter did not disavow Silva's remarks. At that time, therefore, ITO had reason to believe that reinstating Wesley would continue to post a problem on the docks.[9]

The May 12, 1981, letter was sent after Silva had ceased to be president, thus eliminating a major obstacle to Wesley's reinstatement.[10] Further, that letter was sent by the Union's recording secretary, not the Union's attorney, and purported to speak for the entire union membership. It was a far more credible document than any previous one ITO had received. Thus, I find that backpay for the walking foreman's position was tolled as of May 13, 1981.

The Union on brief tries unsuccessfully to argue that backpay was tolled as of the October 16 letter. The Union argues first that Stanton testified that Silva did not threaten a strike if Wesley was put back on the job as walking foreman, and then later indicates that Silva did not threaten a strike if Wesley were put back on the job of *relief winchman*, not walking foreman, and not a supervisory position.

Second, the Union argues that Silva could not guarantee what his individual men would do. This is specious, since it was Silva who orchestrated these unfair labor practices against Wesley.[11]

Failure To Mitigate Damages

The Union attempts to establish that Wesley failed to mitigate his damages because he was not diligently seeking work as a longshoreman. Testimony was elicited showing that some members with lower seniority worked more hours than Wesley. However, it is impossible to tell from these hours how many of them were overtime and how many were regular hours.

Further, Wesley's hours were not so low as to give the impression that Wesley was not being diligent in seeking employment. Antone Alves, who like Wesley holds a B card (ranked by seniority), worked only 103 hours more than Wesley during 1979 and 1980. It is the Union's burden to prove that Wesley has failed to mitigate his damages. The evidence provided by the Union is not sufficient to carry that burden.

Backpay for Relief Winchman

Counsel for all sides agreed at the hearing that, should backpay be awarded for the walking foreman position, it would not be awarded for relief winchman. This is sensible, since Wesley could not have worked both jobs at the same time. Were I to make an award for relief winchman, I would find for Wesley in the amount of $1,492.61 plus accrued interest.

It was apparent from testimony at the hearing that the position of extra longshoreman, which began October 1, 1980, with the initiation of a new 3-year union contract, is a different name for the position of relief winchman. The function of both these positions is to provide relief to gang members on the docks. Although each job appears to have different qualifications, the same people have been assigned to relief winchman position and extra longshoreman positions. Peter Vierra credibly testified that he had never seen an extra longshoreman do any tasks that separated this job from the relief winchman position. Wesley testified similarly. Stanton testified that he had seen the extra longshoreman perform duties different from a relief winchman, but his recollection was vague.

Backpay for this position would run to the present even if the two positions *were* found to be wholly different. Generally, if a job that has been eliminated can be traced to another job into which the discriminatee could reasonably have been expected to be transferred, reinstatement to the job is appropriate and backpay continues to run.[12]

Wesley's Medical Expenses

From June 1978 to June 1980, Wesley underwent psychotheraphy from Dr. William Hancur, a clinical psychologist associated with the Rhode Island Group Health Association (RIGHA). Dr. Hancur testified credibly that on Wesley's first visit he determined that Wesley's need for psychotherapy was a direct result of his work situation. Although Wesley did have other problems in his life at the time, Dr. Hancur stated that, in his expert opinion, Wesley would not have sought treatment if it had not been for his job-related problems.[13] Several subsequently therapy sessions were held and Dr. Hancur

[8] See, for instance, *Reinforcing Iron Workers, Local Union No. 426, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Tryco Steel Corporation)*, 192 NLRB 97 (1971), enfd. 81 LRRM 2479 (D.C. Cir. 1972).

[9] See *Bricklayers, Masons and Plasterers' International Union of America, Bricklayers Local No. 2, AFL-CIO (Glenshaw Glass Company, Inc.)*, 176 NLRB 434 (1969), for a similar situation.

[10] There had been bad relations between Silva and Wesley at least since December 1977, when Silva had bet Wesley that he could have him taken off the walking foreman job at ITO. In early 1978 Silva had repeatedly told Wesley that Wesley did not belong at union meetings and that he (Silva) had a way of stopping Wesley's attendance, again a reference to Silva's own ability and desire to have Wesley fired. (See the initial decision in this case for more detail.)

[11] I find that the "refusal" of 30–40 men at the October union meeting was a fabrication on Silva's part. Both Wesley and Peter Vierra, another union member, testified credibly that, although Silva had announced to the men that they would have to work with Wesley, no one at the meeting said they would not. Silva's failure to appear at the hearing enhances the credibility of the Wesley/Vierra version of this incident. (Although Silva was subpoenaed to appear at the hearing, he was not present at any time. No explanation was offered.)

[12] See *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO, et al. (Associated General Contractors of America)*, 213 NLRB 363 (1974), enfd. in relevant part 531 F.2d 424 (9th Cir. 1976).

[13] Indeed, Dr. Hancur testified that Wesley had indicated to him that he sought therapy in order to stop his violent thoughts against Silva before the thoughts turned into violent actions.

did not change his initial opinion about the cause of Wesley's acute anxiety.

Wesley has either paid or been billed a total of $110 for these psychotherapy services, in accordance with the regular rate structure of RIGHA. This amount, together with 1 day of lost wages when Wesley was visiting Dr. Hancur and did not work ($261.60 for walking foreman and $84 for relief winchman), is included in the amount of backpay that the General Counsel is requesting for Wesley.

Generally, the Board has awarded backpay for the loss of earnings incurred by an unfair labor practice.[14] In some cases, it had awarded medical expenses and/or contributions to health or pension plans that would have been made but for an unfair labor practice.[15]

As stated in *Local 777, Democratic Union Organizing Committee* v. *N.L.R.B.*, 603 F.2d 862, 890 (D.C. Cir. 1978), ". . . it is well settled that the Board's discretion in the selection of remedies is exceedingly broad." The injury to be remedied in this case includes the economic loss for psychotherapy expenses suffered by Wesley as a result of the Union's unfair labor practice against him. As the Board found in *Graves Trucking, Inc.*,[16] a clear and direct relationship exists between the injury and the remedy requested. In *Graves Trucking*, the Board wrote:

> Congress charged the Board, in Section 10(c) of the Act, with the task of devising remedies to effectuate the policies of the Act. A backpay order is one of the remedial devices adopted to attain just results in diverse complicated situations . . . . like other Board remedies, backpay is intended to dispel the effect of unlawful conduct, whether in response to protected concerted activities or union activities, by *restoring discriminatees as nearly as possible to the economic position they would have enjoyed in the absence of the unlawful conduct.* [Emphasis supplied.]

The discriminatee in *Graves* was a union shop steward who was attacked by a supervisor. This attack resulted in the discriminatee's inability to work. The Board ordered a monetary award despite the fact that the employee had never really been discharged. The respondent employer was responsible for the economic loss, and was made to restore the employee to the *status quo ante*. See also *The Mead Corporation*, 256 NLRB 686 (1981), where the Board, citing an earlier Federal court case,[17] states:

> . . . it is the Board's established policy to order restoration of the *status quo ante* to the extent feasible where there is no evidence that to do so would impose an undue or unfair burden on the respondent.

Dr. Hancur testified at the hearing that, in his opinion, Wesley would not have been able to continue to work without psychotherapy. Thus, it would appear that, without psychotherapy, Wesley's interim earnings would have been less and more money would have been owed to him by the Respondents. Since the Union was the direct cause of Wesley's need for psychotherapy, it would not be an "undue or unfair burden" on the Union to pay for Wesley's psychotherapy expenses.

Finally, the Board, in recent years, has begun to award reimbursement for losses other than the losses of wages. In *Matlock Truck Body & Trailer Corp.*,[18] the Board awarded $100 in expenses to an employee for the loss of his tools and toolbox, which had been kept by the respondent during the course of a strike. Wesley's loss was much more than the loss of tools; it was the loss of mental health. The reimbursement of fees paid to try to restore that is surely a reasonable application of the Board's "make whole" remedy in regard to backpay. As the Board explained in *Matlock*, "Absent Respondent's unfair labor practices, [the discriminatee] would not have been forced to purchase new equipment." In the same way, absent the Union's unfair labor practices, Wesley would not have been forced to seek therapeutic help. The $110 is awarded. (The $261.60 for walking foreman pay on the day Wesley missed work to meet with Dr. Hancur is already included in the backpay specification amount.)

ORDER[19]

The Respondent, International Longshoremen's Association, Local 1329, its officers, agents, successors, and assigns, shall satisfy its obligation to make whole the discriminatee involved by the payment of net backpay in the amount of $28,913.82 plus accrued interest, computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977),[20] minus any tax withholding required by Federal or state laws.[21]

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[14] See the first decision in this case, 246 NLRB 810 (1979).

[15] See, for instance, *Kraft Plumbing and Heating, Inc.*, 252 NLRB 891 (1980).

[16] 246 NLRB 344 (1979).

[17] *Allied Products Corporation, Richard Brothers Division*, 218 NLRB 1246 (1975), enfd. in relevant part 548 F.2d 644 (6th Cir. 1977).

[18] 248 NLRB 461 (1980).

[19] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[20] This method was reaffirmed in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[21] In the event that the Union is unable to satisfy its financial obligation for the walking foreman position, it will become liable for the backpay and medical expenses compiled for the relief winchman position. Should the Union also fail in its obligation to Wesley for this lesser amounts, ITO Corp. of Rhode Island, Inc., becomes liable for payment of the relief winchman's backpay.